Supreme Court, U.S.
FILED
JUL 18 2000
CLERK

(2)

No. 99-1857

IN THE

Supreme Court of the United States

SMITH COGENERATION INTERNATIONAL, INC.,

Petitioner,

v.

SMITH/ENRON COGENERATION LIMITED PARTNERSHIP, INC., ENRON INTERNATIONAL C.V., ENRON DEVELOPMENT CORP., ENRON RESERVE I B.V., ATLANTIC COMMERCIAL FINANCIAL B.V. and TRAVAMARK TWO B.V.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

GREGORY MARKEL
Counsel of Record
RONIT SETTON
BROBECK, PHLEGER & HARRISON LLP
Attorneys for Respondents
1633 Broadway, 47th Floor
New York, New York 10019
(212) 581-1600

160955

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

27 pp

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Rule 29.6, Respondents Smith/Enron Cogeneration Limited Partnership, Inc., Enron International C.V., Enron Development Corp., Enron Reserve I B.V., Travamark Two B.V. and Atlantic Commercial Financial B.V. make the following disclosures:

There are no publicly held companies that own 10% or more of the stock of any Respondents. The parent companies or owners of Respondents are as follows:

SMITH/ENRON COGENERATION LIMITED PARTNERSHIP, INC.

General Partners:

Smith Cogeneration Dominicana, Inc.
Enron Dominican Republic Operations Ltd.

Limited Partners:

Smith Cogeneration International, Inc.
Enron Dominican Republic Ltd.
Enron Dominicana Limited Partnership

ENRON INTERNATIONAL C.V.

General Partner:

Enron International B.V.

Limited Partner:

India Electric Maintenance Ltd.

ENRON DEVELOPMENT CORP.

Owner(s):

Enron Power Corp.

ENRON RESERVE I B.V.

Owner(s):

Atlantic Commercial Finance, Inc.

TRAVAMARK TWO B.V.

Owner(s):

Atlantic Commercial Finance, Inc.

ATLANTIC COMMERCIAL FINANCIAL B.V.
(The correct name of this party is Atlantic Commercial Finance B.V. I.i.)

Owner(s):

Atlantic Commercial Finance, Inc.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	iii
Table of Cited Authorities	iv
Reasons for Denying the Writ	1
Statement of Facts	3
I. Federal Law Governs The Enforcement Of Arbitration Between The Parties	6
A. Federal Law Dictates That Agreements to Arbitrate be Enforced According to Their Terms	6
B. Federal Law Applies Because this Dispute Implicates the Convention	8
C. There is no Basis for Applying New York Law in this Case	10
D. The Second Circuit's Ruling Does Not Conflict with Supreme Court Precedent or Decisions in Other Circuits	11
II. The Arbitration Agreements Are Enforceable Under Federal Law	13
Conclusion	20

TABLE OF CITED AUTHORITIES

Page

Cases:

Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank National Ass'n, 731 F.2d 112 (2d Cir. 1984) ... 10, 12

Acquaire v. Canada Dry Bottling, 906 F. Supp. 819 (E.D.N.Y. 1995) 18

American Diagnostica of Connecticut, Inc. v. Centerchem, Inc., No. 94 Civ. 7047 (DC), 1996 WL 71494 (S.D.N.Y. Feb. 20, 1996) 18

Atherton v. FDIC, 519 U.S. 213 (1997) 12

AT&T Techs., Inc. v. Communications Workers of America, 475 U.S. 643 (1986) 19

Butchers, Food Handlers & Allied Workers Union v. Hebrew Nat'l Kosher Foods, Inc., 818 F.2d 283 (2d Cir. 1987) 19

Coenen v. R.W. Pressprich & Co., 453 F.2d 1209 (2d Cir. 1972), *cert. denied*, 406 U.S. 949 (1972) 8, 19

David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245 (2d Cir. 1991) 8

Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S., 9 F.3d 1060 (2d Cir. 1993) 14

Cited Authorities

	Page
Dobson v. Counsellors Secs., Inc., No. 94-CV-73942-DT, 1995 WL 871004 (E.D. Mich. Sept. 13, 1995)	20
Doctor's Assocs. Inc. v. Casarotto, 517 U.S. 681 (1996)	12
E.G.L. Gem Lab Ltd. v. Gem Quality Inst. Inc., No. 97 Civ. 7102 (LAK), 1998 WL 314767 (S.D.N.Y. June 15, 1998)	15
EZ Pawn Corp. v. Mancias, 934 S.W.2d 87 (Tex. 1996)	7
Filanto, S.p.A v. Chilewich Int'l Corp., 789 F. Supp. 1229 (S.D.N.Y. 1992)	9
First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995)	12
Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840 (2d Cir. 1987)	8
Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126 (7th Cir. 1997)	12
Harvey v. Joyce, 199 F.3d 790 (5th Cir. 2000)	8
Insta-Bulk, Inc. v. Powertex Inc., 764 F. Supp. 52 (S.D.N.Y. 1991)	18

Cited Authorities

Page

Jack B. Anglin Co., Inc. v. Tipps, 842 S.W.2d 266 (Tex. 1992) 7

J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315 (4th Cir. 1988) 14, 15

Lachmar v. Trunkline LNG Co., 753 F.2d 8 (2d Cir. 1985) 17

Letizia v. Prudential Bache Secs., Inc., 802 F.2d 1185 (9th Cir. 1986) 8

Litton Fin. Printing Div. v. NLRB, 501 U.S. 190 (1991) 18

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) 6

McAllister Bros., Inc. v. A & S Transp. Co., 621 F.2d 519 (2d Cir. 1980) 14

McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., 741 F.2d 342 (11th Cir. 1984) 14

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 473 U.S. 614 (1985) 8

Monroe Sander Corp. v. Livingston, 377 F.2d 6 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967) 18

Cited Authorities

	Page
Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983)	7
Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO, 430 U.S. 243 (1977)	19
Oldroyd v. Elmira Savs. Bank, FSB, 134 F.3d 72 (2d Cir. 1998)	7
Perry v. Thomas, 482 U.S. 483 (1987)	12
Riley Mfg. Co., Inc. v. Anchor Glass Container Corp., 157 F.3d 775 (10th Cir. 1998)	12
Sharon Steel Corp. v. Jewell Coal and Coke Co., 735 F.2d 775 (3d Cir. 1984)	8
Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753 (11th Cir. 1993), *cert. denied*, 513 U.S. 869 (1994)	14, 15
Tenneco Resins, Inc. v. Davy Int'l, A.G., 770 F.2d 416 (5th Cir. 1985)	17
Thomson-CSF, S.A. v. American Arbitration Ass'n., 64 F.3d 773 (2d Cir. 1995)	14
United States v. Panhandle Eastern Corp., 693 F. Supp. 88 (D. Del 1988)	17

Cited Authorities

Page

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 19, 20

Vainqueur Corp. v. Lamborn & Co., 305 F. Supp. 1007 (S.D.N.Y. 1969) 16

Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468 (1989) 6

Statutes:

9 U.S.C. §§ 201-208 1

9 U.S.C. § 203 9

Other Authority:

Joseph T. McLaughlin, *Alternative Dispute Resolution in the Corporate Sector*, SDO6 ALI-ABA 1231 (1998) 6

REASONS FOR DENYING THE WRIT

The sole issue presented by the Petition is whether the Second Circuit properly held that federal law, rather than New York law, governs the enforceability of agreements to arbitrate between Petitioner Smith Cogeneration International, Inc. ("SCI") and Respondents Enron International C.V. and a number of its affiliates (collectively, "Enron" or the "Enron Entities"). Applying federal law, the Second Circuit affirmed the district court's order compelling arbitration and enjoining SCI from pursuing its lawsuit in the Dominican Republic against Enron in contravention of SCI's agreements to arbitrate disputes with Enron.

Under the facts of this case, there can be no question that federal law applies: (i) the arbitration agreements between the parties expressly provide that the Federal Arbitration Act ("FAA") applies to the enforcement of arbitration; (ii) this is a federal question case arising under Chapter Two of the FAA, 9 U.S.C. §§ 201-208 (implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention")); (iii) there are compelling reasons to apply federal law, which is already well-developed, to the question of whether an agreement to arbitrate is enforceable; (iv) there exists a strong federal policy in favor of arbitration, particularly in the international context; and (v) the parties did not intend that New York law would govern any disputes.

In an attempt to avoid arbitration despite having entered into several broad agreements to arbitrate disputes with Enron, SCI makes the convoluted assertion that New York's choice of law rules apply and in turn point to the law of Turks and Caicos (and thereby some dicta from a British case and an ordinance that does not even address the relevant issue). There is simply no basis, however, for the first step

in SCI's analysis — that New York law applies. None of the agreements at issue contains any reference to New York law, much less a New York choice of law provision, none of the parties is a New York resident, none of the underlying events occurred in New York, and the parties do not assert diversity jurisdiction. Contrary to SCI's assertion that the Second Circuit's ruling (the "Opinion") conflicts with Supreme Court and Circuit Court decisions, none of the cases cited in the Petition arose under the Convention or involved an arbitration agreement specifying the applicability of the FAA.[1]

---

1. SCI also claims in passing that the Second Circuit "misus[ed] veil piercing and estoppel theories" in holding that Enron is entitled to invoke the arbitration clause despite the assignments made by the parties. SCI briefly explains its objection to the Court's use of the veil-piercing theory in a footnote, but never explains why the Second Circuit allegedly "misus[ed]" an estoppel theory to prevent SCI from avoiding its obligation to arbitrate disputes with Enron. *See* Pet. at 5 & n.4. Enron believes that SCI's cursory reference to the Second Circuit's determination on these issues, which is not mentioned in any other section of the Petition, is insufficient for purposes of seeking and obtaining a writ of certiorari. In the event that this Honorable Court determines that these issues are properly raised by the Petition, however, we respectfully refer the Court to Part II of this Opposition and to Enron's Answer to SCI's Petition for Rehearing before the Second Circuit, in which Enron demonstrates that these aspects of the Second Circuit's ruling are also correct. We also note that the Second Circuit held that SCI is required to arbitrate under ***either*** an estoppel or veil piercing theory. Therefore, if this Honorable Court finds that the Second Circuit's determination on the estoppel issue is not properly raised by the Petition or does not warrant review, SCI's objection to the application of veil piercing is irrelevant because it was not essential to the Second Circuit's holding.

STATEMENT OF FACTS

In July 1993, SCI signed a power purchase agreement ("PPA") with the state-owned utility in the Dominican Republic to construct, finance, and manage an electrical power plant in Puerto Plata. (Joint Appendix ("JA") A157). On November 12, 1993, SCI and Enron International C.V. agreed to create a joint venture to construct, manage, and operate the plant, as reflected in a Project Agreement. (JA A14-A40). On November 24, 1993, Smith Cogeneration Dominicana, Inc. ("Smith Dominicana"), an SCI affiliate, and Travamark Two B.V. ("Travamark"), an Enron affiliate, formed the Smith/Enron Cogeneration Limited Partnership ("SECLP") pursuant to an agreement (the "1993 Agreement" (JA A41-A91)). The 1993 Agreement stated that the purpose of the SECLP was to construct, own, manage, and operate the power plant to be located in Puerta Plata. (JA A53, Art. II ¶ 2.5). The 1993 Agreement also required Smith Dominicana to cause SCI to contribute and assign all of its interest in the PPA with the state-owned utility in the Dominican Republic to SECLP. (JA A57-A58, Art. IV § 4.2).

On May 1, 1994, Smith Dominicana assigned part of its partnership interest in SECLP to SCI, thereby making SCI a party to the 1993 Agreement. (JA A203-A217). Similarly, on December 1, 1993, Travamark assigned its limited partner's interest in SECLP to another Enron affiliate, Atlantic Commercial Finance B.V. (JA A193-A197). On April 15, 1994, Travamark assigned its general partner's interest to Enron Reserve I B.V. (JA A198-A202). Upon assignment, each of the assignees agreed to be bound by the terms and provisions of the 1993 Agreement.

The 1993 Agreement was amended on December 15, 1994 (the "1994 Agreement") (JA A92-A129). The 1994 Agreement reflects the addition of the new partners whose interests had been assigned to them by the original partners to SECLP as reflected above. The partners at this time were Smith Dominicana, SCI, Enron Reserve I B.V., and Atlantic Commercial Finance B.V. *Id.* The 1994 Agreement contains a broad arbitration clause and also provides that "[a]ny arbitration under this Section 11.14 shall for all purposes be governed by, ***and construed and enforced in accordance with, the Federal Arbitration Act ('FAA') and matters of interpretation of the provisions of this agreement shall be governed by Texas law in any such arbitration***." (JA A126, § 11.14(h)) (emphasis added).[2]

The 1994 Agreement was amended on April 30, 1996 (the "1996 Agreement"). (JA A130-A141). The arbitration provisions remained unchanged. (*Id.* § 11.14). At this time, Smith Dominicana Ltd. and an Enron affiliate entered into a Holding Partnership Agreement, which contains arbitration clauses virtually identical to those contained in the SECLP agreements. (JA A188-A190, § 11.20). In June 1998, Smith Dominicana Ltd. and the Enron affiliate submitted to the

---

2. The Project Agreement and 1993 Agreement contain a similar provision:

> [a]ny arbitration under this Article IX(4) [Section 11.14] ***shall for all purposes be governed by, and construed and enforced in accordance with, the Federal Arbitration Act*** ('FAA') and applicable Texas law (except to the extent Texas law conflicts or is inconsistent with the FAA), without giving effect to Texas principles of choice of law.

(JA A37, Art. IX(4)(h); JA A77, § 11.14(h)) (emphasis added).

arbitration of a dispute arising under the Holding Partnership Agreement. At the outset of the arbitration hearing, Smith Dominicana, Ltd. conceded the sole issue in the arbitration. The arbitrator awarded the Enron affiliate $300,000 in attorney's fees on July 8, 1998. This amount has not been paid. (JA A144-A145, ¶ 3).

Obviously disappointed with the result in the arbitration and ignoring the several agreements to arbitrate outlined above, SCI, on July 31, 1998, filed suit in the Dominican Republic against SECLP, Enron Reserve I B.V., Travamark Two B.V., Atlantic Commercial Finance, B.V., and Enron Development (the "Dominican Lawsuit"). In its complaint in that action, SCI alleges that in 1993 it was defrauded and coerced by these companies into becoming a partner in SECLP and assigning its interest in the PPA to SECLP. (JA A145-A146, ¶ 4). In the complaint SCI asks that each of the agreements between it and any of the Respondents be annulled and terminated. The complaint also requests, *inter alia*, $159 million in damages. (*Id.* ¶¶ 4, 5). The filing of the Dominican Lawsuit constituted a failure and refusal by SCI to arbitrate. As a result, the Enron Entities had no choice but to commence this proceeding by filing a petition to compel arbitration and enjoin SCI from further prosecuting the action in the Dominican Republic.

Judge Richard C. Casey of the United States District Court for the Southern District of New York granted Enron's petition in a decision read from the bench on November 6, 1998, and judgment was entered on December 22, 1998. The Second Circuit affirmed Judge Casey's ruling on December 8, 1999, and denied SCI's petition for rehearing with a suggestion for rehearing en banc on February 23, 2000.

I.

FEDERAL LAW GOVERNS THE ENFORCEMENT OF ARBITRATION BETWEEN THE PARTIES

A. Federal Law Dictates That Agreements to Arbitrate be Enforced According to Their Terms

The Second Circuit properly enforced the parties' agreement that federal law applies to the enforcement of arbitration. This Honorable Court has consistently held that privately negotiated agreements to arbitrate are to be enforced according to their terms.[3] The central issue raised in this case is the enforceability of the arbitration clauses in the agreements between the parties. Since SCI agreed that the FAA would apply to the enforcement of arbitration under the relevant agreements, New York choice of law rules and Turks and Caicos law do not even arguably apply. As noted above, the 1994 Agreement contains the following choice of law provision: "[a]ny arbitration under this Section 11.14 ***shall for all purposes be governed by, and construed and***

---

3. *See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58 (1995); *see also* Joseph T. McLaughlin, *Alternative Dispute Resolution in the Corporate Sector*, SDO6 ALI-ABA 1231, 1241-42 (1998) ("[t]he ruling in *Volt* had an immediate impact on every existing and future arbitration agreement .... From that point forward, if a party to a contract containing an arbitration agreement or contractual choice of law provision wanted to avoid possible delays in the courts, the contract had to state explicitly that the parties intended to be bound by federal law applicable to arbitration").

enforced in accordance with, the Federal Arbitration Act, and matters of interpretation of the provisions of this agreement shall be governed by Texas law [only] ***in*** any such arbitration." (*See* JA A126, § 11.14(h); emphasis added).[4] The other agreements between the parties similarly provide that the FAA applies to the enforcement of arbitration.

Federal law determines whether an agreement to arbitrate is enforceable where the parties have agreed to the applicability of the FAA. The FAA "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see Oldroyd v. Elmira Savs. Bank, FSB*, 134 F.3d 72, 76 (2d Cir. 1998) (same). This federal substantive law

---

4. Texas law does not apply to the dispute between the parties. The 1994 and 1996 Agreements provide that Texas law applies only ***in*** arbitration, and the FAA applies to the enforcement of arbitration. Although the arbitration clauses in the Project Agreement and 1993 Agreement refer to both the FAA and Texas law, they expressly exclude Texas principles of choice of law, and the Supreme Court of Texas repeatedly has held that where an agreement provides for the application of both Texas law and the FAA, the FAA prevails. *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 91 (Tex. 1996); *see Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 271 (Tex. 1992) (the FAA preempts all otherwise applicable state laws under the supremacy clause of the United States Constitution, is substantive and is the law of Texas). In any event, as the Second Circuit noted in its Opinion, neither party argued that Texas law applied. Pet. App. 16a. To the extent SCI is now arguing that Texas law applies, *see* Pet. at 12-13, it has waived any such argument. SCI has also waived any argument based on the Rules of Decision Act, which was not mentioned in any prior brief. In any event, there is no support for SCI's assertion that the Rules of Decision Act requires application of the law of the forum in this case.

"comprises generally accepted principles of contract law." *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 845 (2d Cir. 1987). As stated by the Second Circuit, "[o]nce a dispute is covered by the [FAA], ***federal law applies to all questions of [the arbitration agreement's] interpretation, construction, validity, revocability, and enforceability.***" *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1211 (2d Cir. 1972), *cert. denied*, 406 U.S. 949 (1972) (emphasis added).[5]

B. Federal Law Applies Because this Dispute Implicates the Convention

Federal law applies for the additional reason that the dispute between the parties falls under the Convention. The strong federal policy in favor of arbitration, particularly in the context of international business transactions, compels the application of federal law. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 629-31 (1985) (the Convention makes it clear that "the federal arbitration policy applies with special force in the field of international commerce"); *see David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 248-49 (2d Cir. 1991) (applying federal

---

5. *See Harvey v. Joyce*, 199 F.3d 790, 793 (5th Cir. 2000) (in determining whether the parties agreed to arbitrate their dispute, court applies federal substantive law of arbitrability to any arbitration agreement within the coverage of the FAA); *Letizia v. Prudential Bache Secs., Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986) (because issue of whether nonsignatories were bound by the agreement "involve[d] the arbitrability of a dispute, it is controlled by application of federal substantive law rather than state law"); *Sharon Steel Corp. v. Jewell Coal and Coke Co.*, 735 F.2d 775, 777 n.6 (3d Cir. 1984) ("The ultimate arbitrability of a contract is a matter of federal substantive law").

law in a diversity case because the suit related to international commerce); *Filanto, S.p.A v. Chilewich Int'l Corp.*, 789 F. Supp. 1229, 1235-37 (S.D.N.Y. 1992) (applying federal law in a diversity case to the question of whether a contract is enforceable in a case arising under the Convention).

In addition, under 9 U.S.C. § 203, the district courts have original jurisdiction over actions falling under the Convention, which are "deemed to arise under the laws and treaties of the United States." Finally, as the Second Circuit noted in its Opinion, in actions brought under the Convention there are:

> compelling reasons to apply federal law, which is already well-developed, to the question of whether an agreement to arbitrate is enforceable. *See David L. Threlkeld & Co.*, 923 F.2d at 249-50 (holding Convention and FAA preempt Vermont statute); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 845-46 (2d Cir. 1987) (applying federal common law in case arising under the Convention); *Borsack v. Chalk & Vermilion Fine Arts, Ltd.*, 974 F. Supp. 293, 299 n.5 (S.D.N.Y. 1997) ("[W]here jurisdiction is alleged under chapter 2 of the Federal Arbitration Act the issue of enforceability and validity of the arbitration clause is governed by federal law").

Opinion, Pet. App. 15a.

C. There is no Basis for Applying New York Law in this Case

Because the arbitration clauses in the agreements between the parties demonstrate that the parties intended that federal law would apply to the enforcement of arbitration, SCI ignores these clauses and instead asserts that: (i) New York choice of law rules apply and in turn point to the law of Turks & Caicos; and (ii) Turks & Caicos law applies because the parties' dispute allegedly implicates the internal affairs of the partnership.[6]

SCI's first argument fails for two reasons. First, SCI is unable to point to a single reference to New York law in any of the relevant agreements. Thus, as the Second Circuit properly found, "it is [ ] clear that neither party intended New York law . . . to govern any aspect of their dispute." Opinion, Pet. App. 16a. Second, since this is a federal question case and not a diversity case, no relevant transactions occurred here and no party is domiciled here, there is no justification for SCI's assertion that New York

---

6. SCI's assertion that the law of Turks & Caicos dictates that an assignor loses right to arbitrate, *see* Petition at 11, is false. Section 6(4) of the Limited Partnerships Ordinance of the Turks & Caicos Islands does not even address this issue (and the Ordinance cited is not the 1992 version referenced in the relevant agreements), and the quotation from the British case cited in the Petition is merely dicta. In addition, SCI's citation to *Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank National Ass'n*, 731 F.2d 112 (2d Cir. 1984) for the proposition that an assignor loses the right to arbitrate under New York law, *see* Petition at 11, is irrelevant because: (i) *Aaron Ferer* had nothing to do with arbitration and (ii) SCI is not even arguing that New York substantive law applies.

choice of law rules should apply simply because it is the law of the forum. *See id.*

SCI's second argument is equally without merit. The fact that the 1994 Agreement provides for application of Turks & Caicos law with respect to internal partnership affairs and matters relating to the "organization" of the partnership is irrelevant. Internal partnership affairs and the "organization" of the partnership do not include the arbitrability of contract disputes where the agreements specifically address that issue and provide for the applicability of the FAA. In addition, SCI's argument that its dispute with Enron is an "internal affairs matter," *see* Petition at 10-11, is inconsistent with the fact that the Enron Entities are no longer partners and the fact that SCI is seeking nullification of the agreements.

D. The Second Circuit's Ruling Does Not Conflict with Supreme Court Precedent or Decisions in Other Circuits

The Second Circuit's holding that federal law — and not the law of Turks and Caicos pursuant to New York choice of law rules — determines Enron's right to invoke arbitration does not conflict with Supreme Court or other Circuit Court decisions. None of the cases cited by SCI that applied state choice of law rules involved either the Convention or contractual choice of law clauses providing for the applicability of federal law. In contrast, each of the arbitration agreements between SCI and the Enron Entities ***expressly provide*** that the FAA applies to the enforceability of arbitration — the precise issue in this lawsuit — and SCI no longer contests that this case falls under the Convention. In addition, none of the cases cited by Petitioner applied a

particular state's law merely because it was the law of the forum.

Although each case cited in the Petition is irrelevant because of these important distinctions, many of the cases are either inapposite or do not support SCI's position for additional reasons. For example, SCI's citation to *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), is irrelevant because the issue in that case was whether the Kaplans, who had not personally signed an agreement to arbitrate, had in fact agreed to arbitrate. Here, there is no dispute that the parties entered into several agreements to arbitrate. SCI's citations to *Doctor's Associates Inc. v. Casarotto*, 517 U.S. 681 (1996) and *Perry v. Thomas*, 482 U.S. 483 (1987), are odd because in both cases this Honorable Court reviewed a state court judgment and held that the FAA preempted conflicting state law. SCI's citations to *First Options, Aaron Ferer & Sons Ltd.*, 731 F.2d 112, and *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1130 (7th Cir. 1997), are also curious since these courts conducted an interest analysis to determine which law should apply; SCI does not contend that an interest analysis is appropriate. In *Riley Manufacturing Co., Inc. v. Anchor Glass Container Corp.*, 157 F.3d 775, 780 n.5 (10th Cir. 1998), the court applied Florida and Kansas law only because the manufacturing agreement at issue specified Florida choice of law and both parties relied on Kansas law for purposes of the appeal.

In *Atherton v. FDIC*, 519 U.S. 213 (1997), this Honorable Court held that there is no federal common law providing a standard of care for officers and directors of federally insured savings institutions. *Atherton* did not involve arbitration, much less arbitration under the FAA; it merely stands for the proposition that state law prevails if

there is no distinct or conflicting important federal policy or interest. Here, the strong federal policy in favor of arbitration compels the application of federal law.

II.

THE ARBITRATION AGREEMENTS ARE ENFORCEABLE UNDER FEDERAL LAW

The Enron Entities' right to arbitrate any disputes with SCI pursuant to the relevant agreements was not impacted by their assignments of their interests in the partnership. SCI's assertion that the assignments eliminated Enron's right to invoke the arbitration agreements is an attempt to have it both ways. SCI has chosen to sue these same companies in the Dominican Republic, not their assignees, because SCI's dispute is with Enron over precisely the agreements that contain the arbitration clauses. SCI cannot sue these entities over these agreements and at the same time claim that the dispute resolution mechanism in these very agreements is moot. Moreover, SCI seeks, in part, nullification of these agreements. Since the claims in the Dominican Lawsuit arose from actions that took place well before the Enron entities assigned their interests in the SECLP partnership to their affiliates, the broad arbitration agreements between the parties govern their disputes.

Applying federal law, the Second Circuit properly found that even if it accepted SCI's assertion that the Enron Entities are non-signatories to an arbitration agreement with SCI, arbitration is appropriate. Courts recognize five theories for binding non-signatories to arbitration agreements according to "ordinary principles of contract and agency," including estoppel and veil-piercing. *See* Opinion, Pet. App. 16a-17a;

Thomson-CSF, S.A. v. American Arbitration Ass'n., 64 F.3d 773, 776 (2d Cir. 1995); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir. 1993); *McAllister Bros., Inc. v. A & S Transp. Co.*, 621 F.2d 519, 524 (2d Cir. 1980).

Estoppel is warranted where, as here, a signatory to an arbitration agreement attempts to resist the arbitration of claims against a non-signatory which are "intimately founded in and intertwined with the underlying contract obligations." *See Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993), *cert. denied*, 513 U.S. 869 (1994). Under the estoppel theory, a signatory to an arbitration agreement can be compelled to arbitrate at the insistence of a non-signatory where the claims to be resolved in arbitration are "intimately founded in and intertwined with the underlying contract obligations." *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co.*, 741 F.2d 342, 344 (11th Cir. 1984). The Fourth and Eleventh Circuits have estopped a signatory from avoiding arbitration with a non-signatory under these circumstances. *See Sunkist*, 10 F.3d 753; *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320-21 (4th Cir. 1988); *McBro Planning*, 741 F.2d 342. In each of these cases, the signatories had entered into arbitration agreements with entities closely related to the parties asserting arbitration. Similarly, SCI conceded in its principal brief to the Second Circuit that it is a party to a "living" arbitration agreement with affiliates of the Enron respondents. *See* Brief for Respondent-Appellant at 10.

It is undisputed that SCI (and its affiliate) signed broad arbitration agreements with the Enron Entities encompassing "***any dispute***, disagreement, controversy, or claim arising under or ***relating to any obligation or claimed obligation***

under the provisions of this Agreement." (JA A35-A37, Art. IX(4)(a); JA A125-A126, § 11.14; JA A75-A77, § 11.14; JA A130-A141) (emphasis added). Since SCI indicated its willingness to arbitrate with each of the Enron Entities at some point, there is an even greater justification for applying estoppel here than was the case in *Sunkist*, *J.J. Ryan*, and *McBro Planning*.

SCI alleges in the Dominican Lawsuit that it was defrauded and coerced by Enron into becoming a partner in SECLP. It also requests nullification or rescission of the agreements between SCI and its related companies and the "Enron Group." (JA A145-A146, ¶¶ 4, 5). Given the nature of SCI's claims against Enron, there can be no question that the claims are closely related to Enron's obligations or claimed obligations under the agreements containing arbitration clauses. *See E.G.L. Gem Lab Ltd. v. Gem Quality Inst. Inc.*, No. 97 Civ. 7102 (LAK), 1998 WL 314767, at *3 (S.D.N.Y. June 15, 1998) (granting non-signatory's demand for arbitration against a signatory because of the tight nexus between the claims raised and the claims arising under the agreement containing the arbitration clause).[7]

The Second Circuit also correctly determined that the particular circumstances present here justify allowing Enron to invoke arbitration under the agreements. As noted in the Opinion, even SCI refers to the related Enron companies in its complaint in the Dominican Lawsuit as the "Enron Group," "affiliates," and "Enron," as "though they were

---

7. We note that the Second Circuit properly determined that SCI is estopped from avoiding arbitration as a matter of law. The *Sunkist* court observed that the issue of whether the signatory is estopped from contesting the non-signatory's standing to invoke the clause is a question of law. *Id.*

interchangeable." Pet. App. 18a. In addition, because it is the Enron Entities that are requesting arbitration, a court need not be "wary of imposing a contractual obligation to arbitrate on a non-contracting party." *Id.* at 17a. As noted above, however, the Court's determination on this issue was not necessary to its holding.

Since the Enron Entities and SCI ***are*** signatories to arbitration agreements encompassing the dispute in the Dominican Lawsuit, there are additional bases under federal substantive law for compelling arbitration despite the assignments among Enron affiliates. These arguments were set forth in Enron's briefs to the Second Circuit. They were not addressed in Second Circuit's Opinion because the Court found that SCI should be compelled to arbitrate even if the Court accepted SCI's argument that the Enron Entities should be treated as non-signatories. Since we believe that these arguments provide an alternative basis for the Second Circuit's ruling, we repeat them here.

In *Vainqueur Corp. v. Lamborn & Co.*, 305 F. Supp. 1007, 1008 (S.D.N.Y. 1969), the court granted a petition to compel arbitration of a dispute arising from respondent's refusal to pay certain freights claimed to be due under an agreement even though petitioner irrevocably assigned its right to receive payment for those freights.

The court found that, despite the assignment, petitioner was still a "party aggrieved" under § 4 of the FAA by the failure of respondent to arbitrate and noted:

> When there is a specific written agreement to arbitrate any dispute that may arise out of an agreement, and one of the parties to that

> agreement fails to comply with its terms, ***the other party is entitled to an order compelling arbitration even if that party has irrevocably assigned its rights under the agreement.***

Id. (emphasis added). Thus, Enron is "aggrieved" by SCI's failure to arbitrate and is entitled to an order compelling arbitration despite the assignments.[8]

In addition, the Second and Fifth Circuits have both permitted the arbitration of a dispute between a party that has assigned its rights under a contract and the other party to the original agreement without commenting on the fact that an assignment was made. *See Lachmar v. Trunkline LNG Co.*, 753 F.2d 8 (2d Cir. 1985) (assignee of a shipping company's rights under a contract was not an indispensable party to an arbitration between the assignor shipping company and the other party to the contract, the shipper);[9] *Tenneco Resins, Inc. v. Davy Int'l, A.G.*, 770 F.2d 416, 417, 422 (5th Cir. 1985) (directing district court to enter an order staying litigation pending arbitration under the contract

---

8. SCI cannot have it both ways. It cannot commence an action containing claims for fraud and fraudulent inducement against the assignors of agreements in connection with the assigned agreements and at the same time ask this Honorable Court to ignore the arbitration clauses of those very agreements which provide the appropriate means to resolve precisely those claims.

9. The court in *Lachmar* applied New York law with respect to an assignee's duty to arbitrate because, as a related case notes, Trunkline LNG Company and Lachmar "expressly provided that New York law would govern [their 1996] Transportation Agreement" — the same agreement at issue in the *Lachmar* case. *United States v. Panhandle Eastern Corp.*, 693 F. Supp. 88, 95 (D. Del 1988).

between appellant and appellee even though appellee's "rights and obligations under this contract were subsequently assigned to" another party).

Further, termination of a contract does not extinguish a party's rights and duties under an arbitration clause contained in a contract. This Honorable Court has held that a claim that involves facts and occurrences which arose before expiration of an agreement, can be said to arise under the contract and thus is arbitrable. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 205-06 (1991); *see Monroe Sander Corp. v. Livingston*, 377 F.2d 6, 10 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967) (arbitration clause ordinarily survives expiration of the agreement that contains it and governs any dispute that arises out of the agreement).

Courts in the Second Circuit uniformly compel arbitration where a dispute involves facts and circumstances that arise before termination or expiration of an agreement. *See, e.g., American Diagnostica of Connecticut, Inc. v. Centerchem, Inc.*, No. 94 Civ. 7047 (DC), 1996 WL 71494, at *4 n.2 (S.D.N.Y. Feb. 20, 1996); *Acquaire v. Canada Dry Bottling*, 906 F. Supp. 819, 832-33 (E.D.N.Y. 1995) (expiration of distributor's agreement had no bearing on the arbitrability of plaintiffs' causes of action, which arose from events that occurred prior to expiration); *Insta-Bulk, Inc. v. Powertex Inc.*, 764 F. Supp. 52, 53-54 (S.D.N.Y. 1991) (rejecting defendant's argument that the arbitration clause of a license agreement could no longer be invoked because defendant had terminated the agreement, since "obligations to arbitrate can survive contract expiration," and directing parties to promptly invoke arbitration procedure). Here, since the events giving rise to the dispute in the Dominican Lawsuit occurred prior to both the termination by assignment of the

relationship between the parties as partners in the SECLP partnership and the superceding of the earlier agreements, all of SCI's claims are arbitrable.

Moreover, since the language of the arbitration clauses is broad and does not contain any temporal limitations, the strong federal policy in favor of arbitration requires that SCI be compelled to arbitrate the claims made in the Dominican Lawsuit. *See Butchers, Food Handlers & Allied Workers Union v. Hebrew Nat'l Kosher Foods, Inc.*, 818 F.2d 283, 287 (2d Cir. 1987) ("If the contract does not state that the duty to arbitrate ends with the termination of the contract, the strong policies favoring arbitration should ordinarily lead the court to conclude that the obligation to arbitrate — especially as to claims that accrued during the term of the contract — survives the expiration of the contract"); *Coenen v. R.W. Pressprich & Co.*, 453 F.2d at 1212 (arbitration applied to actions predating the signing of the contract by the petitioner because the contract stated that it governed "any controversy" between the parties).[10] As the Second Circuit stated in its Opinion, "the relevant inquiry is whether SCI's claims 'relat[e] to any obligation or claimed obligation

---

10. As stated by this Honorable Court, "the parties' failure to exclude from arbitrability contract disputes arising after termination, far from manifesting an intent to have arbitration obligations cease with the agreement, affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationship." *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243, 255 (1977); *see AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986) (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-585 (1960)) ("[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail").

under' the 1994 agreement, not when they arose. We think it is evident that SCI's claims in the Dominican Lawsuit fall within this broad language." Pet. App. 21a.

Since an arbitration clause survives the agreement containing it under federal law absent a termination provision plainly specific to the arbitration clause, the arbitration agreements between Enron and SCI survived any assignment or superceding agreement. *See Dobson v. Counsellors Secs., Inc.*, No. 94-CV-73942-DT, 1995 WL 871004, at *6 (E.D. Mich. Sept. 13, 1995) (citing *United Steelworkers of America*, 363 U.S. at 584-85).

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

GREGORY MARKEL
Counsel of Record
RONIT SETTON
BROBECK, PHLEGER & HARRISON LLP
Attorneys for Respondents
1633 Broadway, 47th Floor
New York, New York 10019
(212) 581-1600